Nik Norhafizi bin Nik Ibrahim & Ors v Public Prosecutor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 41-120 OF 2009
SU GEOK YIAM J
31 DECEMBER 2011

Constitutional Law — Fundamental liberties — Freedom of assembly — Whether restriction imposed by s 27(2) of the Police Act 1967 read with s 27(5) on freedom of assembly reasonable in interests of national security and public order — Whether assembly organised or spontaneous — Whether appellants' presence at assembly unintentional and result of innocent circumstances

The appellants, who were undergraduates of various universities, were found guilty by the magistrate's court of being in an unlawful assembly held on the grounds of the National Mosque in Kuala Lumpur to protest against the Internal Security Act 1960. They were each fined RM3,900 in default three months' jail for the offence under s 27(5) of the Police Act 1967 ('the Act'). The assembly did not have a police permit under s 27(2) of the Act. The appellants' defence was that they were not participants in the assembly; that they did not know each other and that each of them happened to go separately to the National Mosque on the day in question to perform Friday prayers after which they intended to leave the premises but found themselves in the thick of a crowd of people who had gathered there. The appellants appealed to the High Court against their conviction and sentence on the grounds, inter alia, that: (i) s 27(2) read with s 27(5) of the Act was unconstitutional as being inconsistent with arts 5, 8, 10(1)(b) and 10(2)(b) of the Federal Constitution; (ii) the magistrate (who was the third magistrate to hear the case) failed to give reasons why she did not hear the appellants' cases de novo and failed to state in her judgment whether or not she found the appellants' defences believable and whether they had raised a reasonable doubt on the prosecution's case; and (iii) the magistrate erred in concluding the appellants were guilty simply by their presence at the assembly without considering that it could have been a spontaneous gathering and not organised.

Held, dismissing the appeals and affirming the convictions and sentences:

(1) The restriction imposed by s 27(5) read together with s 27(2) of the Act on the fundamental liberty of citizens to assemble peaceably and without arms was a reasonable restriction imposed by Parliament in the interest of the security of the Federation or any part thereof or public order (see para 24).

(2) Section 27(5) read together with s 27(2) of the Act were substantially just

and fair provisions and therefore reasonable because they only sought to regulate organised assemblies to prevent the convening or collecting of any assembly which was likely to be prejudicial to the interest of the security of Malaysia or any part thereof or which was likely to excite a disturbance of the peace (see para 56).

(3) There was credible and cogent evidence before the magistrate in the form of testimonies and photographs which had captured the images of the appellants, the police and the participants of the assembly (many of whom were masked) which sufficiently established a prima facie case that the assembly in the instant case was organised (see para 58).

(4) The assembly could not possibly have been formed spontaneously or on an impromptu or unplanned basis. There must have been prior agreed plans and preparations made to obtain the paraphernalia used in the assembly such as the placards and banners. The participants of the assembly had formed a human chain, waved placards and banners and shouted for the repeal of the Internal Security Act and refused to heed police instructions to disperse. The conduct of the participants excited a disturbance of the peace (see para 59).

(5) The appellants failed to show on balance of probabilities that their presence in the unlawful assembly came about through innocent circumstances and that they had no intention to participate in or be associated with the assembly. Their explanations were not plausible and could not reasonably be true when tested against the backdrop of the prosecution's case (see para 134 & 142).

(6) The magistrate's omission to give reasons for the exercise of her discretion not to hear the case de novo was an irregularity curable under s 422 of the CPC as no prejudice was caused to the appellants. The appellants had heard the testimonies of the prosecution witnesses and seen the documentary evidence produced at the trial. None of them applied to re-call any of the prosecution witnesses for further cross-examination before the third magistrate (see para 70).

[Bahasa Malaysia summary

Perayu-perayu, yang merupakan mahasiswa-mahasiswa pelbagai universiti, yang telah didapati bersalah oleh mahkamah majistret kerana berada dalam perhimpunan haram yang diadakan di kawasan Masjid Negara di Kuala Lumpur untuk membantah Akta Keselamatan Dalam Negeri 1960. Setiap seorang daripada mereka telah didenda RM3,900 dan jika gagal membayar denda, penjara tiga bulan penjara untuk kesalahan di bawah s 27(5) Akta Polis 1967 ('Akta tersebut'). Perhimpunan itu tidak mempunyai permit polis di bawah s 27(2) Akta tersebut. Pembelaan perayu-perayu adalah bahawa mereka bukan peserta-peserta dalam perhimpunan itu; bahawa mereka tidak mengenali antara satu sama lain dan bahawa setiap daripada mereka kebetulan

telah pergi ke Masjid Negara pada hari yang dipersoalkan untuk menunaikan solat Jumaat yang mana selepas itu mereka berhasrat untuk meninggalkan premis tetapi mendapati diri mereka dalam kerumunan orang ramai yang berhimpun di situ. Perayu-perayu telah merayu ke Mahkamah Tinggi terhadap sabitan dan hukuman mereka atas alasan-alasan, antara lain, bahawa: (i) s 27(5) dibaca dengan s 27(2) Akta adalah tidak berperlembagaan sebagai tidak konsisten dengan perkara-perkara 5, 8, 10(1)(b) dan 10(2)(b) Perlembagaan Persekutuan; (ii) majistret (yang merupakan majistret ketiga untuk mendengar kes itu) telah gagal untuk memberikan alasan-alasan kenapa beliau tidak mendengar kes-kes perayu-perayu *de novo* dan telah gagal untuk menyatakan dalam penghakiman beliau sama ada atau tidak beliau mendapati yang pembelaan-pembelaan perayu-perayu boleh dipercayai dan sama ada mereka telah menimbulkan keraguan munasabah ke atas kes pendakwaan; dan (iii) majistret tersebut terkhilaf dalam membuat kesimpulan perayu-perayu adalah bersalah hanya dengan kehadiran mereka di perhimpunan itu tanpa mengambil kira bahawa ia mungkin satu perhimpunan spontan dan yang tidak dirancang.

Diputuskan, menolak rayuan-rayuan dan mengesahkan sabitan-sabitan dan hukuman-hukuman:

(1) Sekatan yang dikenakan oleh s 27(5) yang dibaca bersama s 27(2) Akta tersebut berhubung kebebasan rakyat untuk berhimpun secara aman dan tanpa sekatan munasabah yang dikenakan oleh Parlimen demi kepentingan keselamatan negara atau mana-mana bahagian daripadanya atau ketenteraman awam (lihat perenggan 24).

(2) Seksyen 27(5) dibaca bersama s 27(2) Akta tersebut adalah peruntukan-peruntukan yang adil dan saksama dan oleh itu adalah munasabah kerana peruntukan-peruntukan tersebut hanya digunakan untuk mengawal selia perhimpunan terancang bagi mengelakkan berlaku apa-apa perhimpunan diadakan atau berkumpul yang mungkin memudaratkan kepentingan keselamatan Malaysia atau mana-mana bahagiannya atau yang berkemungkinan merangsang gangguan keamanan (lihat perenggan 56).

(3) Terdapat keterangan yang boleh dipercayai dan meyakinkan di hadapan majistret dalam bentuk testimoni dan gambar foto yang merakam imej-imej perayu-perayu, polis dan peserta-peserta perhimpunan (kebanyakannya bertopeng) yang mencukupi untuk membuktikan kes prima facie bahawa perhimpunan dalam kes ini telah dirancang (lihat perenggan 58).

(4) Perhimpunan itu tidak mungkin terbentuk secara spontan atau secara tiba-tiba atau tanpa dirancang. Pasti terdapat rancangan dan persediaan yang dipersetujui terdahulu dibuat untuk mendapatkan perkakas yang digunakan dalam perhimpunan seperti sepanduk dan kain rentang.

Peserta-peserta perhimpunan telah membentuk rantaian manusia, mengibarkan sepanduk dan kain rentang dan menjerit untuk pemansuhan Akta Keselamatan Dalam Negeri dan enggan mematuhi arahan polis supaya bersurai. Kelakuan para peserta telah menganggu keamanan (lihat perenggan 59).

(5) Perayu-perayu telah gagal untuk menunjukkan atas imbangan kebarangkalian bahawa kehadiran mereka dalam perhimpunan haram timbul daripada keadaan yang tidak bersalah dan bahawa mereka tiada niat untuk menyertai atau dikaitkan dengan perhimpunan tersebut. Penjelasan mereka tidak munasabah dan tidak mungkin benar jika diuji berlatarbelakangkan kes pendakwaan (lihat perenggan 134 & 142).

(6) Peninggalan majistret untuk memberikan sebab untuk pelaksanaan budi bicara beliau untuk tidak mendengar kes *de novo* adalah luar aturan yang boleh dipulihkan di bawah s 422 Kanun Acara Jenayah kerana tiada prejudis diakibatkan ke atas perayu-perayu. Perayu-perayu telah mendengar testimoni-testimoni daripada saksi-saksi pendakwaan dan melihat keterangan dokumentar yang dikemukakan dalam perbicaraan. Tiada daripada mereka memanggil semula mana-mana daripada saksi-saksi pendakwaan untuk pemeriksaan balas di hadapan majistret ketiga (lihat perenggan 70).]

Notes

For a case on freedom of assembly, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) para 2362.

Cases referred to

Ahmad Saidi bin Md Isa v Timbalan Menteri Hal Ehwal & Ors [2006] 3 MLJ 208; [2006] 1 CLJ 977, CA (refd)

Boddington v British Transport Police [1999] 2 AC 143, HL (refd)

Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia [2006] 6 MLJ 213; [2007] 1 CLJ 19, CA (refd)

Mat v PP [1963] MLJ 263 (refd)

Pendakwa Raya v Cheah Beng Poh & Ors [1984] 2 MLJ 225; [1984] 1 CLJ 117 (refd)

Siva Segara v PP [1984] 2 MLJ 212, FC (refd)

Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333; [2010] 3 CLJ 507, FC (refd)

Legislation referred to

Criminal Procedure Code ss 173A, 261, 294

Federal Constitution arts 4(1), (2), (5)(1), 8, 8(1), 9(2), 10, 10(1)(b), (2), (2)(b), (c)

Legal Profession Act 1976 s 46A, 46A(1)

Internal Security Act 1960

Police Act 1967 s 27(1), (2), (3), (5), (5A), (5B), (5C), (6), (8), (8A)

Edmund Bon (Amer Hamzah Arshad with him) (Daim & Gamany) for the appellants.

Mohd Hafiz bin Mohd Yusof (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution/the respondent.

Seira Sacha (Young Ai Ping and Aston Peira with him) watching brief for the Bar Council.

Su Geok Yiam J:

BACKGROUND

[1] In this appeal the five appellants are appealing against both their convictions and sentences for being found in an unlawful assembly in respect of which a police permit had not been obtained under s 27(2) of the Police Act 1967 (Act 344) ('the Act').

[2] The convictions and sentences were handed down after a full trial by the learned magistrate on 18 June 2009 in the Kuala Lumpur Magistrate's Court involving five separate cases, ie Arrest Cases Nos E83–1283, 1285, 1287,1289 and 1295 of 2001, which were jointly tried.

[3] Two other accused persons, namely, Wan Mohd Sanusi bin Wan Mohd Noor and Helman bin Sanuddin, ('the two other accused persons'), who were also charged separately in the same court, in Arrest Cases Nos E83–129 of 2001 and E83–1293 of 2001, respectively, but who were also tried together with the five appellants, were acquitted and discharged.

[4] In all the seven cases, the five appellants and the two other accused persons were first charged on 19 July 2001 for having committed an offence under s 27(5) of the Act punishable under s 27(8) of the Act.

[5] The punishment provided in s 27(8) of the Act for the offence is a fine of not less than two thousand ringgit and not more than ten thousand ringgit and the offender is also liable to imprisonment for a term not exceeding one year.

[6] The learned magistrate had sentenced each of them to a fine of RM3,900 in default three months imprisonment. The fine has been paid by each of the five appellants.

THE CHARGE

[7] The charge against each of the five appellants and the two other accused persons states as follows in the Malay language:

Bahawa kamu pada 8 Jun 2001 diantara jam 2.00 petang hingga 2.15 petang, di perkarangan Masjid Negara, Jalan Perdana, dalam Daerah Dang Wangi, Wilayah Persekutuan Kuala Kumpur telah didapati berada dalam satu perhimpunan haram (unlawful assembly) iaitu satu perhimpunan di tempat awam di mana lesen di bawah seksyen 27(2) Akta Polis 1967 (Akta 344) tidak dikeluarkan, oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 27(5) Akta Polis 1967 (Akta 344) dan boleh dihukum di bawah seksyen 27(8) Akta yang sama.

THE APPELLANTS' SIX GROUNDS OF APPEAL

[8] The five appellants have put forth the following six grounds of appeal in their petition of appeal dated 21 July 2010:

(a) s 27(5) of the Act read together with s 27(2) of the Act is unconstitutional because it is inconsistent with arts 5, 8, 10(1)(b) and 10(2)(b) of the Federal Constitution;

(b) the learned magistrate erred when she neither recalled those witnesses who had testified before the previous magistrate to give evidence before her nor gave her reasons pursuant to s 261 of the Criminal Procedure Code (the 'CPC') as to why she did not exercise his discretion to order the five cases to be heard *de novo* since she was not the magistrate who had heard the testimonies of those witnesses;

(c) the learned magistrate erred when she applied the principle enunciated in the case of *Mat v Public Prosecutor* [1963] 1 MLJ 263 only to the defence of the sixth accused, namely, Helman bin Sanuddin, but did not apply it to the defence of each of the five appellants as she did not state in her grounds of judgment whether she believed or accepted the defence of all the five appellants and if she did not believe or accept the defence of the five appellants whether their defence had, nevertheless, raised a reasonable doubt in the prosecution case and and if she was so satisfied the five appellants were entitled to be acquitted and discharged;

(d) the learned magistrate erred when upon the conclusion of the trial she did not undertake a maximum evaluation of the totality of the prosecution and defence cases in order to determine whether the prosecution had proved the charge against the five appellants beyond reasonable doubt;

(e) the learned magistrate erred in fact and/or in law when she ruled that all the ingredients of the charge against the appellants had been proved by the prosecution by the mere presence of the five appellants at the assembly instead of considering whether a spontaneous collection of individuals could constitute an unlawful assembly within the meaning of s 27(5) of the Act and applying the principle of law as enunciated in the case of *Siva Segara v Public Prosecutor* [1984] 2 MLJ 212 to the facts of the

five cases before her as the prosecution had failed to prove that the assembly was an organised assembly; and

(f) the learned magistrate erred when she did not re-evaluate the evidence of the prosecution witnesses at the conclusion of the defence case after having heard the evidence of the defence witnesses and merely assumed that the evidence of the prosecution witnesses was correct resulting in the learned magistrate placing a heavier burden on the defence than is allowed by the law.

DECISION OF THIS COURT

[9] On 27 January 2011, this court dismissed their appeals and confirmed both their convictions and sentences (the 'said decision').

[10] Being dissatisfied with the said decision all the five appellants have applied to the Court of Appeal for leave to file an appeal against the said decision.

[11] On 26 April 2011, the Court of Appeal granted leave to all the five appellants to file a notice of appeal against the said decision.

[12] On 5 May 2011 the five appellants filed their notice of appeal against the said decision.

REASONS FOR THE SAID DECISON

[13] Below are the reasons why the court made the said decision.

[14] From the submissions of the parties, the court was of the view that there were eight issues which required the determination of this court.

EIGHT ISSUES FOR THE DETERMINATION OF THIS COURT

[15] The eight issues are as follows:

(a) whether s 27(5) of the Act read together with s 27(2) of the Act is unconstitutional and therefore ought to be declared null and void pursuant to art 4(1) of the Federal Constitution?

(b) whether the learned magistrate who was the third magistrate to hear the case erred when she neither recalled those witnesses who had testified before the previous magistrate to give evidence before her nor gave her

reasons pursuant to s 261 of the Criminal Procedure Code (the 'CPC') as to why she did not exercise her discretion to order the five cases to be heard de novo since she was not the magistrate who had heard the testimonies of those witnesses?

(c) whether the learned magistrate erred when upon the conclusion of the trial she did not undertake a maximum evaluation of the totality of the prosecution and defence cases in order to determine whether the prosecution had proved the charge against the five appellants beyond reasonable doubt?

(d) whether the learned magistrate erred in fact and/or in law when she ruled that all the ingredients of the charge against the appellants had been proven by the prosecution by the mere presence of the appellants at the assembly instead of considering whether a spontaneous collection of individuals could constitute an unlawful assembly within the meaning of s 27(5) of the Act and applying the principle of law as enunciated in the case of *Siva Segara v Public Prosecutor* [1984] 2 MLJ 212 as the prosecution had failed to prove that the assembly was an organised assembly?

(e) whether the learned magistrate erred when she did not re-evaluate the evidence of the prosecution witnesses at the conclusion of the defence case after having heard the evidence of the defence witnesses and merely assumed that the evidence of the prosecution witnesses was correct resulting in the learned magistrate placing a heavier burden on the defence than is allowed by the law?

(f) whether there was sufficient evidence before the learned magistrate that the five appellants had committed the offence?

(g) whether the learned magistrate had sufficiently considered the defence of the five appellants before handing down the convictions? and

(h) whether the sentences were manifestly excessive?

Whether s 27(5) of the Act read together with s 27(2) of the Act is unconstitutional and therefore ought to be declared null and void pursuant to art 4(1) of the Federal Constitution?

[16] The court was of the view that the first issue had no merits.

[17] Nevertheless, the court agreed with and accepted the submission of the learned counsel of the appellants that in this appeal the appellants are entitled to challenge the law under which they were prosecuted and, subsequently, convicted, ie s 27(5) of the Act, as being unconstitutional and, therefore, null and void on the ground that it contravenes the Federal Constitution, ie art 10

(see *Boddington v British Transport Police* which was quoted with approval in *Ahmad Saidi bin Md Isa v Timbalan Menteri Hal Ehwal & Ors* [2006] 3 MLJ 208; [2006] 1 CLJ 977).

[18] Having considered the facts and circumstances of the instant case and the submissions of all the parties, the court was of the view that s 27(5) of the Act read together with s 27(2) of the Act did not contravene the Federal Constitution and that it was valid and constitutional.

[19] The court also rejected the appellants' submission that the requirement contained in s 27(2) of the Act for the obtaining of a permit under that section (the 'requirement') overreaches the permissible restriction allowed for under art 10(2)(b) of the Federal Constitution. The court was of the view that the requirement was a permissible restriction and that it was not an unreasonable restriction.

[20] Section 27(2) of the Act states as follows:

> (2) Any person intending to convene or collect any assembly or meeting or to form a procession in any public place aforesaid, shall before convening, collecting or forming such assembly, meeting or procession make to the Officer-in-Charge of the Police District in which such assembly, meeting or procession is to be held an application for a licence in that behalf, and if such police officer is satisfied that the assembly, meeting or procession is not likely to be prejudicial to the interest of the security of Malaysia or any part thereof or to excite a disturbance of the peace, he shall issue a licence in such form as may be prescribed specifying the name of the licensee and defining the condidtions upon which such assembly, meeting or procession is permitted:
>
> Provided that such police officer may at any time on any ground for which the issue of a licence under this subsection may be refused, cancel such licence.

THE LAW

[21] The fundamental right of a citizen of Malaysia to assemble peaceably and without arms is enshrined in art 10(1)(b) of the Federal Constitution (the 'Constitution').

[22] Article 10 of the Constitution states as follows:

> Freedom of speech, assembly, and association
>
> 10.
>
> (1) Subject to Clauses (2), (3) and (4) —
>
> (a) every citizen has the right to freedom of speech and expression;

(b) all citizens have the right to assemble peaceably and without arms; A

(c) all citizens have the right to form associations.

(2) Parliament may by law impose —

(a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necesary or expedient in the interest of the B security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence; C

(b) on the right conferred by paragraph (b) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof or public order;

(c) on the right conferred by paragraph (c) of Clause (1), such restrictions as it deems necessaryor expedient in the interest of the D security of the Federation or any part thereof, public order or morality.

(3) …

(4) … E

[23] This court is of the view that para (1)(b) of art 10 of the Constitution expressly gives every citizen the right to assemble peaceably and without arms. However, this right is, in the view of this court, not an absolute right. F

[24] The reason can be found in art 10(1)(b) itself which expressly subjects this right to cl 2(b). Clause 2(b) expressly allows for restrictions to be imposed on that right in the interest of security and public order. It expressly provides that Parliament may by law impose on the right conferred by para (b) of cl (1) G such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof or public order.

[25] Therefore, it is manifestly clear from the wording used in art 10(2) in the Constitution, that the framers of the Constitution did not intend to confer H an absolute right on the citizens of this country to assemble peaceably and without arms (see *Pendakwa Raya v Cheah Beng Poh & Ors* [1984] 2 MLJ 225; [1984] 1 CLJ 117).

[26] It also follows from the clear wording used in that provison that I Parliament is the only authority which is clothed with the power and discretion to impose by law, such restrictions as Parliament deems necessary or expedient in the interest of the security of the Federation or any part of the Federation or in the interest of the public order.

[27] Nevertheless, in imposing such restrictions Parliament must ensure that the restrictions are reasonable. The reason is because in *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213; [2007] 1 CLJ 19 the Court of Appeal held that the word 'reasonable' ought to be read into the relevant provision of the Federal Constitution in order to qualify the word 'restriction' so as to limit the width of the restriction. The reasoning of the Court of Appeal in that case has been adopted by the apex court in the case of *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333; [2010] 3 CLJ 507.

[28] In that case the Federal Court held that a principle of Constitutional interpretation, which is relevant to the present appeal, is that provisos or restrictions that limit or derogate from a guaranteed right must be read restrictively. The Federal Court, consequently, held that the word 'reasonable' should be read into art 10(2)(c) of the Federal Constitution so as to qualify the width of the proviso which confers power on Parliament to impose by law on the right conferred by para (c) of cl (1) of art 10(2)(c) of the Federal Constitution such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality.

[29] In that case the appellant, an advocate and solicitor who is also an office bearer of a political party and a member of Parliament, challenged the constitutionality of s 46A(1) of the Legal Profession Act 1976 (the 'LPA'). The Federal Court decided that s 46A of the LPA which classifies advocates and solicitors into two categories ie those who hold office in a political party being members of Parliament and those who do not, is a reasonable classification as there is an important reason of policy in support of the classification contained in that section. The important reason of policy in support of that classification made by that section is that it is fair and just that the governance of a professional body be kept in the hands of professionals who have no other visible political interests that may create the perception that the Bar Council has political leanings.

[30] It, therefore, held that s 46A of the LPA is compliant with the equality clause of art 8(1) of the Federal Constitution.

[31] It, consequently, held the section to be constitutional and a valid law as it is a fair and just law within art 5(1) of the Federal Constitution. It also held that the appellant's right within the compass of the personal liberty clause, ie art 5(1) of the Federal Constitution, to serve on the Bar Council, the governing body of the Malaysian Bar, was deprived in accordance with law. In arriving at that decision, the Federal Court held that in respect of an Act of Parliament, the test of constitutionality is essentially one which is based on reasonableness and substantive fairness.

[32] Reverting back to the instant case, the Police Act 1967 (the 'Act') is clearly a law made by Parliament. This court is of the view that the restriction imposed by s 27(5) of the Act read together with s 27(2) of the Act on the fundamental liberty of the citizens of this country to assemble peaceably and without arms is a reasonable restriction which was imposed by Parliament on a citizen's constitutional right to freedom of assembly in the interest of the security of the Federation or any part thereof or public order.

[33] The court noted that the Legislature has throughout the history of its treatment of the problem of unlawful assemblies conferred on the police the power to control such assemblies. The court is of the view that s 27(5) of the Act does not prevent members of the public from exercising their basic right to assemble peaceably without arms, eg in order to express their feelings and views on a matter or issue or to show support for a certain cause or causes. The provision merely seeks to control or regulate the manner in which an organised assembly may be conducted or carried out.

[34] For this purpose, s 27(2) of the Act requires an organised assembly, meeting or procession to be covered by a licence otherwise it is deemed to be an unlawful assembly (per Hashim Yeop Sani FJ in the case of *Pendakwa Raya v Cheah Beng Poh & Ors* [1984] 2 MLJ 225; [1984] 1 CLJ 117 (Rep)). By imposing such a requirement on the organisers of an assembly, meeting or procession, to obtain a licence before the assembly, meeting or procession is convened, the police can control or regulate the manner in which such an assembly may be conducted or carried out.

[35] Now when does an assembly of citizens become an unlawful assembly?

[36] Section 27(5) of the Police Act 1967 provides that any assembly, meeting or procession which takes place without a licence issued under sub-s (2) or in which three or more persons taking part neglect or refuse to obey any order given under the provisions of sub-s (1) or sub-s (3) shall be deemed to be an unlawful assembly, and all persons attending, found at or taking part in such assembly, meeting or procession and, in the case of an assembly, meeting or procession for which no licence has been issued, all persons taking part or concerned in convening, collecting or directing such assembly, meeting or procession, shall be guilty of an offence.

[37] Section 27(5) of the Act states as follows:

> (5) Any assembly, meeting, or procession —
>
> (a) which takes place without a licence issued under subsection (2); or
>
> (b) in which three or more persons taking part neglect or refuse to obey any order given under the provisions of subsection (1) or subsection (3),

A shall be deemed to be an unlawful assembly, and all persons attending, found at or taking part in such assembly, meeting or procession and, in the case of an assembly, meeting or procession for which no licence has been issued, all persons taking part or concerned in convening, collecting or directing such assembly, meeting or procession, shall be guilty of an offence.

B

[38] Subsection (1) of s 27 of the Act empowers an officer in charge of a police district (the 'OCPD') or any police officer duly authorised in writing by him to direct in such manner as he may deem fit the conduct in public places in the district of all assemblies, meetings and processions. Subsection (2) C requires an organiser of an assembly or meeting or procession to apply for a police permit.

[39] Subsection (3) empowers any officer to stop any assembly, meeting or procession in respect of which a licence has not been issued or having been D issued was subsequently cancelled under sub-s (2) or which contravenes any of the conditions of any licence issued in respect thereof under that subsection; and any such police officer may order the persons comprising such assembly, meeting or procession to disperse.

E

[40] The word 'convene' is given, inter alia, the following meaning in the *Concise Oxford English Dictionary*:

call people together for (a meeting); assemble for a common purpose.

F

[41] The word 'collect' is given, inter alia, the following meaning in the *Concise Oxford English Dictionary*:

bring or gather together

G

[42] The word 'organise' is given, inter alia, the following meaning in the *Concise Oxford English Dictionary*:

make arrangements or preparations for

H

[43] The court is of the view that by virtue of the wording used by Parliament in s 27(5) of the Act the expression 'unlawful assembly' in that provision ought to be construed to mean either an assembly of citizens which has been organised, ie where prior arrangements or preparations have been I made for the assembling or bringing or gathering together of citizens for a common purpose by a person or persons without applying for and obtaining a licence ie a police permit, for that purpose issued by the relevant police officer in charge of the police district under s 27(2) of the Act (which the court describes as the 'first type of unlawful assembly') or an assembly of citizens in

respect of which a licence which was initially issued by the police has been cancelled and in which three or more persons taking part neglect or refuse to obey any order given under the provisions of sub-s (1) or sub-s (3) of s 27 of the Act (which the court describes as the 'second type of unlawful assembly') or an assembly of citizens which contravenes any of the conditions of any licence which has been issued and in which three or more persons taking part neglect or refuse to obey any order given under the provisions of sub-s (1) or sub-s (3) of s 27 of the Act (which the court describes as the 'third type of unlawful assembly').

[44] This court is of the view that by virtue of the clear wording of the charge in the instant case the expression 'unlawful assemblyf in the charge can only refer to the first type of unlawful assembly, ie an assembly which was organised without first applying for and obtaining a licence under s 27(2) of the Act.

[45] Having construed the wording used in that subsection read together with s 27(2) of the Act this court was of the considered view that s 27(5) of the Act did not impose a blanket ban on all assemblies of citizens or require that a police permit be obtained in every instance when individuals who are citizens wished to assemble eg for purposes connected with family life or with friends and relatives as when a family of five or when a group of five friends or a group of five relatives and friends wishes to have a picnic in the park they do not need to first obtain a police permit before they can do so without the assembly being labelled an unlawful assembly.

[46] Hashim Yeop Sani FJ in the case of *Pendakwa Raya v Cheah Beng Poh & Ors*, was of the view that the fears expressed by opponents to s 27(5) of the Act that it creates uncertainty and fear among innocent individuals such as the members of a family who only wish to assemble in a public place for a lawful object such as to patronise a *laksa* stall or a snake charmer gathering a crowd to watch his show as too naive an approach to ordinary affairs.

[47] He was also of the view that the provision in s 27 of the Act which requires the convenor to apply for a licence is only one of the modes of regulating an assembly, meeting or procession. He was also of the view that, firstly, the OCPD must issue the licence in ordinary cases and, secondly, the OCPD can only refuse to issue the licence if the OCPD is not satisfied that the assembly, meeting or procession is not likely to be prejudicial to the security of the police district concerned or to excite a disturbance of the peace in the police district concerned.

[48] Article 4(1) of the Constitution expressly declares the Constitution to

be the supreme law of the Federation and stipulates that any law passed after Merdeka Day which is inconsistent with the Constitution shall, to the extent of the inconsistency, be void.

[49] The provision states as follows:

> Supreme law of the Federation
>
> 4(1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

[50] However, there are qualifications which are prescribed in art 4(2)–(4) to the stipulation as mentioned above in art 4(1).

[51] Those provisions state as follows:

> (2) The validity of any law shall not be questioned on the ground that —
>
> (a) it imposes restrictions on the right mentioned in Article 9(2) but does not relate to thematters mentioned therein; or
>
> (b) it imposes such restrictions as are mentioned in Article 10(2) but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article.
>
> (3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or —
>
> (a) if the law was made by Parliament, in proceedings between the Federation and one or more States;
>
> (b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State.
>
> (4) Proceedings for a declaration that a law is invalid on the ground mentioned in clause (3) (not being proceedings falling within paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Federal court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings for the same purpose under paragraph (a) or (b) of the Clause.

[52] The qualifications in art 4(2) are that the validity of any law shall not be questioned on the ground that firstly, it imposes restrictions on the right mentioned in art 9(2) but does not relate to the matters mentioned therein; or secondly, that it imposes such restrictions as are mentioned in art 10(2) of the

Constitution but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that article.

[53] This court will not touch on the qualification in art 4(3) because it is not relevant to the issues which have been raised in the instant case.

[54] The next question that the court has to ask itself is whether the restrictions which are imposed by s 27(2) and (5) of the Act are those which are allowable under art 10(2)(b) of the Federal Constitution. If they fall outside the ambit of that provision then these two provisions in the Act have violated art 10(2)(b) of the Constitution. When that happens it becomes the duty of this court to declare these two provisions in the Act unconstitutional, null and void, pursuant to art 4(1) of the Constitution.

[55] As stated earlier in the case of *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333; [2010] 3 CLJ 507, the Federal Court in deciding that s 46A(1) of the LPA is constitutional and a valid law held, inter alia, that in respect of an Act of Parliament, the test of constitutionality is essentially one which is based on reasonableness and substantive fairness.

[56] In applying that test of reasonableness and substantive fairness to s 27(5) of the Act read together with s 27(2) of the Act, this court is of the view that the two provisions are substantially just and fair and therefore reasonable because they only seek to regulate organised assemblies in order to prevent the convening or collecting of any assembly which is likely to be prejudicial to the interest of the security of Malaysia or any part thereof or which is likely to excite a disturbance of the peace in Malaysia or any part of Malaysia or to disperse any organised assembly which is likely to be prejudicial to the interest of the security of Malaysia or any part thereof or which is likely to excite a disturbance of the peace in Malaysia or any part of Malaysia.

[57] Based on the reasons as set out above, this court was, therefore, satisfied, that the restricitions which are contained in s 27(5) read together with s 27(2) of the Act are reasonable restrictions which are allowed by art 10(2)(b) of the Constitution.

[58] In the instant case, this court was satisfied that there was credible, consistent and cogent evidence which was adduced before the magistrate's court by the prosecution witnesses in the form of sworn oral testimonies and the numerous photographs which had captured the images of the appellants, the police and the participants of the assembly (many of whom were wearing masks) at the material time which was sufficient to establish a prima facie case that the assembly of persons in the compound of the National Mosque was an organised assembly in a public place.

[59] The assembly of persons could not have possibly been formed spontaneously or suddenly on an impromptu basis or on an unplanned basis. This much is clear from the conduct of the participants in forming a human chain, in holding and waving many manila cardboards and banners with the words 'Hapuskan ISA', 'ISA Terlalu Zalim', 'Mansuhkan ISA' amongst many others, in shouting 'Hapuskan ISA' and in refusing to disperse when they were ordered to do so by the police. The conduct of the participants had excited a disturbance of the peace of the Federation as the National Mosque is undisputably situated in Kuala Lumpur which is clearly within the Federation.

[60] The National Mosque is a place of worship for Muslims ie the followers of Islam. It goes without saying that such an assembly ought not to be collected or convened in such a place as it would disrupt the peace, quiet and the sanctity of the National Mosque or for that matter any other place of worship such as a temple where Hindus or Buddhists worship or a church where Christians worship.

[61] It is only logical and common sense to infer from the findings of primary facts that there must have been agreed plans and preparations made prior to the presence of the assembly of persons at the National Mosque for the obtaining of the paraphernalia used in the assembly ie the manila cardboards and the banners. There must also have been a prior decision made as to the choice of the words which were written or printed on them in order to achieve the common purpose of the assembly. The paraphernalia had to be made or purchased in advance in order to be distributed to the participants to enable the participants to hold them up during the assembly. The participants also shouted and chanted common slogans in unison. Many of them also wore masks in order to conceal their identities. These acts could not have possibly happened on the spur of the moment or spontaneously as submitted by learned counsel for the appellants.

Whether the learned magistrate who was the third magistrate to hear the case erred when she neither recalled those witnesses who had testified before the previous magistrate to give evidence before her nor gave her reasons pursuant to s 261 of the Criminal Procedure Code ('the CPC') as to why she did not exercise her discretion to order the five cases to be heard de novo since she was not the magistrate who had heard the testimonies of those witnesses?

[62] The court was of the view that the second issue had no merit.

[63] The chronology of the case shows that the joint trial of the five cases started with Madam Lim Kui Lee as the presiding magistrate (the 'first magistrate'). Upon her transfer to the attorney general's chambers the joint trial

of the five cases was continued by Tuan Mohd Khairi bin Haron ('the second magistrate'). At the close of the prosecution case, he acquitted and discharged all the five appellants without calling for their defence.

[64] Being dissatisfied with his decision the public prosecutor filed a notice of appeal to the High Court of Malaya at Kuala Lumpur.

[65] On 9 November 2006, the Kuala Lumpur High Court allowed the public prosecutor's appeal, ordered the five appellants to enter upon their defence and remitted the five cases back to the learned magistrate to hear the defence of the five appellants.

[66] However, when the five cases were remitted back to the magistrate's court the second magistrate was no longer there. The third magistrate, namely, Puan Azniza Mohd Ali, who took over from the second magistrate then continued the joint trial of the five cases and heard the defence of the five appellants. The defence called 11 witnesses altogether.

[67] This court was of the view that the third magistrate had the discretion to either order the cases to be heard *de novo* or to carry on with the trial of the five cases even though she was not the magistrate who had heard the testimonies of those witnesses who had already been called earlier by the prosecution.

[68] This is clearly provided for in s 261 of the CPC.

[69] The section states as follows:

> Change of Magistrate during hearing
>
> 261. Whenever any Magistrate after having heard and recorded the whole or any part of the evidence in a trial ceases to exercise jurisdiction in it and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself, or he may re-summon the witnesses and recommence the inquiry or trial:
>
> Provided as follows:
>
> (a) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard;
>
> (b) the High Court may, whether there be an appeal or not set aside any conviction had on evidence not wholly recorded by the Magistrate before whom the conviction was had, if that Court is of opinion that the accused has been materially prejudiced thereby, and may order a new trial.

[70] This court was of the view that her failure or omission to give reasons for the exercise of her discretion was an irregularity which could be cured under s 422 of the CPC as there was no prejudice caused to the five appellants. All the five appellants had heard the testimonies of the prosecution witnesses. They also saw the documentary evidence which was produced and tendered by the prosecution. None of the five appellants applied to re-call any of the prosecution witnesses for further cross-examination before the third magistrate.

[71] The prosecution had adduced evidence in the form of sworn oral testimonies of eyewitnesses and also documentary evidence in the form of photographs which were taken of the assembly of persons in order to prove that the assembly is an unlawful assembly of the first type as it was an assembly which had been organised and convened without the obtaining of a police permit.

[72] The third magistrate was able to rely on the notes of evidence recorded by the first and second magistrates and the documentary exhibits produced and tendered by the prosecution in order to arrive at her decision at the close of the defence cases of the five appellants. She found that the defences of the five appellants did not raise a doubt in the prosecution case. She was satisfied that the prosecution had proved the charge against the five appellants beyond reasonable doubt.

Whether there was sufficient evidence before the learned magistrate that the five appellants had committed the offence?

[73] The court was of the view that the third issue had no merit.

[74] The prosecution had called 13 witnesses in their effort to establish a prima facie case against the five appellants as per the charge.

[75] The court was of the view that there was sufficient credible and reliable evidence which was adduced by the 13 prosecution witnesses against all the five appellants to establish that they were members of an unlawful assembly of the first type at the material time.

[76] Firstly, it was not disputed that there was no prior police permit applied for and issued for the assembly of the persons at the place, date and time as stated in the charge.

[77] Secondly, the prosecution had succeeded in adducing sufficiently strong

circumstantial evidence from which an irresistible inference could be drawn that the assembly was an organised assembly.

[78] As stated earlier, the participants carried banners with slogans, shouted similar words and expressions and behaved like members of a group of individuals who shared a common purpose or object by being present in the assembly. There was not even a remote possibility that the persons in the assembly could have met each other by chance at the place, date and time as stated in the charge and that all of a sudden as a result of that chance meeting with each other banners with slogans bearing the words 'Hapuskan ISA' appeared as if from thin air and they held and waved the banners and started shouting similar words and expressions, ie 'Hapuskan ISA', etc.

[79] The court was of the view that the compound of the National Mosque ('the mosque') is a public place because the public has access to it. This is so even though it is common knowledge to the local inhabitants that there is a dress code which the members of the public must follow when they enter the compound of the mosque eg women have to cover their hair and put on attire which covers all parts of their bodies including their bare shoulders, arms and legs. Therefore, there was sufficient evidence to prove this ingredient in the charge against the five appellants.

[80] Subsection (4) of s 27 also makes it an offence for any person who willfully disobeys any order to disperse given by the police officer under sub-s (3) of the same section. Therefore, strictly speaking, the persons who have taken part in the assembly and who have refused to comply with an order of the police to disperse can be charged with having committed two offences.

[81] The first offence is being in an unlawful assembly. The second offence is disobedience to a police order to disperse.

[82] Subsection (6) of s 27 empowers any police officer to arrest without warrant any person reasonably suspected of committing any offence under s 27. It follows from this clear power which is given to the police by this provision that the arrest of the five appellants by the police was lawful. There was also evidence that the members of the unlawful assembly including the five appellants were ordered by the police to disperse but they refused to comply with the valid order of the police. So their arrest by the police was justified and lawful.

[83] The court noted that in the instant appeal the charge against the five appellants states that they were found in an unlawful assembly in a public place where there was no permit issued under s 27(2) of the Act, ie the first type of unlawful assembly. It did not state that they were found in an assembly in

respect of which a licence which was initially issued has been cancelled or which contravened any of the conditions of any licence which has been issued and in which three or more persons taking part in the assembly had neglected or refused to obey an order to disperse given to them by a police officer pursuant to s 27(1) and (3) of the Act ie the second and third types of unlawful assembly.

[84] The court was of the view that the convictions of the five appellants were supported by the evidence adduced by the prosecution and the third magistrate was correct in finding them guilty as charged and in recording the convictions against them.

Whether the learned magistrate had sufficiently considered the defence of each of the five appellants before handing down the convictions on all of them?

[85] The court was of the view that the fourth issue had no merit.

[86] Mr Edmund Bon, learned counsel, for all the five appellants, has submitted that the third magistrate erred when she applied the principle enunciated in the case of *Mat v Public Prosecutor* [1963] 1 MLJ 263 only to the defence of the sixth accused, namely, Helman bin Sanuddin, but not to the defence of each of the five appellants. He had arrived at this conclusion because going by the principle as enunciated in *Mat v Public Prosecutor*, the third magistrate ought to have acquitted and discharged the appellants if their defences had raised a reasonabe doubt in the prosecution case even if she did not believe or accept their defences.

[87] However, he found that the third magistrate did not state in her grounds of judgment whether she believed or accepted the defences of the five appellants. She also did not state whether she did not believe or accept the defences of the five appellants and, whether, if she did not believe or accept their defences, their defences had, nevertheless, raised a reasonable doubt in the prosecution case.

[88] The appellants' learned co-counsel, Encik Amer Hamzah Arshad, has also submitted that all the five appellants did not know each other. They were all undergraduates of different universities. They had merely gone to the mosque on that day to perform their Friday prayers. At the material time they had just completed their prayers. They were not members of the unlawful assembly which was held in the compound of the mosque.

[89] Mr Edmund Bon has also submitted that the third magistrate erred when she did not re-evaluate the evidence of the prosecution witnesses at the conclusion of the defence case for all the five appellants after having heard the

evidence of the defence witnesses. According to him by not re-evaluating the evidence of the prosecution witnesses she had merely assumed that the evidence of the prosecution witnesses was correct. This has resulted in her placing a heavier burden on the defence than is allowed by the law.

[90] The question which arises for the determination of this court is whether the third magistrate had placed a heavier burden on the defence other than the burden to raise a doubt in the prosecution case? This court was of the view that the question posed ought to be answered in the negative.

[91] The reason is that s 27(5) of the Act has been amended. There are three new subsections to that subsection, ie sub-ss (5A), (5B) and (5C).

[92] The new sub-s (5A) expressly provides that where a person has been charged for being found at or taking part in an unlawful assembly, it shall not be a defence that he did not know that the assembly was an unlawful assembly. Therefore, ignorance that the assembly was an unlawful assembly is no longer a valid defence.

[93] The new sub-s (5B) expressly provides that it shall be a defence for any person prosecuted for an offence of attending or being found at an unlawful assembly if he is able to show that it had occurred through innocent circumstances and that he had no intention to be otherwise associated with the assembly. Therefore, upon the prosecution establishing a prima facie case that the person was attending or was found at an unlawful assembly, an evidential burden shifts to the person to prove that his presence at the assembly came about through innocent circumstances and that he has no intention to be a part of the assembly.

[94] The new sub-s (5C) is not applicable to the facts in the instant appeal as it relates to the members of the governing body of the organisation which have convened, collected or directed the assembly, meeting or procession in question which is not the case here.

[95] As stated earlier the five appellants were charged in the lower court for being found in an organised unlawful assembly as the assembly in which they were found in was organised and convened without a police permit. By virtue of sub-s (5A) the five appellants cannot rely on their lack of knowledge or ignorance that the assembly was an unlawful assembly. By virtue of sub-s (5B) the five appellants must satisfy the lower court that their presence at the unlawful assembly came about innocently and that they had no intention to be associated with the unlawful assembly.

[96] This court shall now look at the defence of each of the five appellants

starting with the first appellant's defence and determine whether the third magistrate had correctly evaluated each of their defences. If there was a failure on her part to do so then it becomes the task of this court to carry out that exercise.

The first appellant's defence

[97] In his defence which he made on oath, the first appellant testified as follows in his examination-in-chief:

(a) at the material time he was a student at the Universiti Kebangsaan Malaysia ('UKM'), at the Kuala Lumpur campus;

(b) he was also a student leader by virtue of his position as the third vice-president of the Students Association of UKM ('PMUKM');

(c) he usually performs his Friday prayers at various mosques, namely, the Kuala Lumpur Mosque, the mosque in the compound of the campus of his university, the Hospital Kuala Lumpur Mosque, the Assyakirin KLCC Mosque, the National Mosque and the Kampung Bahru Mosque;

(d) on the day in question, ie 18 June 2001, he attended lectures in the morning as was his usual practice;

(e) after that he rode his motorcycle to the National Mosque in order to perform his Friday prayers because he had planned to go to a shop situated at Jalan Tuanku Abdul Rahman in order to purchase a momento as a souvenir to be presented to a lecturer after he had performed his Friday prayers at the National Mosque;

(f) upon arriving at the National Mosque, he parked his motorcycle at the bottom of the building;

(g) he saw many people in the compound of the building;

(h) he saw many women in head scarves in an open space within the compound of the building;

(i) he also saw policemen in their uniform in the compound of the building;

(j) he also saw a row of people who were observing the many people and the policemen;

(k) he also heard the sound of the traffic passing by the building;

(l) he then walked up the staircase to the main hall where the Friday prayers were being conducted;

(m) he did not use the main staircase in front of the building;

(n) after performing his prayers he walked down the same staircase towards the place where he had parked his motorcycle earlier;

(o) suddenly, he felt his shirt being pulled from behind;

(p) he did not know the identity of the person who did that to him;

(q) the person was dressed in civilian clothes;

(r) he had never seen the person before;

(s) he was then dragged by the person towards a police van;

(t) the person did not tell him the reason why he was dragging him towards the van;

(u) he was then pushed by the person inside the police van;

(v) he saw two other persons inside the police van;

(w) he did not know them and had never met them before;

(x) subsequently, four other persons were brought inside the police van;

(y) he did not know them and had never met them before;

(z) about 30 minutes later, all seven of them were driven and taken to the Dang Wangi Police Station;

(aa) he was interrogated by the police who also recorded his statements three times;

(ab) it was only then that he was told the reason for his arrest and detention by the police;

(ac) the reason was that he was found taking part in an assembly without a permit;

(ad) he was then detained for one night in the lock-up;

(ae) when he was interrogated by the police he had told the police that he had nothing to do with the assembly;

(af) he told the police that when he was walking down the staircase towards his motorcycle the situation was chaotic;

(ag) he did not know the reason for the chaos;

(ah) he saw many people rushing towards the staircase;

(ai) the people were jostling against each other in order to get down from the staircase and they were rushing in order to leave the compound of the building quickly;

(aj) he denied that he had taken part in the assembly;

(ak) he denied that he had formed a human chain with the others in the assembly;

(al) he denied that he had met up with the four other appellants and the sixth accused at the compound of the building; and

(am) he told the court that he heard shouting while he was walking out of the building towards the staircase but he could not remember the contents of the shouting.

[98] When he was cross-examined by the learned deputy public prosecutor ('DPP') he said as follows:

(a) he agreed that he was active in the PMUKM;

(b) the object of the PMUKM was to look after the welfare of the students in UKM;

(c) ss the third vice-president of PMUKM his responsibility was to look after the welfare of the students of UKM;

(d) he disagreed with the suggestion of the learned DPP that in the year 2001, the PMUKM was involved in 'aktiviti reformasi' in and around Kuala Lumpur;

(e) he disagreed with the suggestion of the learned DPP that he knew that there would be 'aktiviti reformasi' in the National Mosque during Friday prayers because he would usually read about it in the newspapers;

(f) he disagreed with the suggestion of the learned DPP that he had gone to the National Mosque on the day in question in order to participate in the unlawful assembly;

(g) he disagreed with the suggestion of the learned DPP that when he arrived at the National Mosque he saw signs which indicated that there was going to be an unlawful assembly;

(h) he disagreed with the suggestion of the learned DPP that he had met two or three of the other accused persons in the prayer room;

(i) he disagreed with the suggestion of the learned DPP that after prayers as he was leaving the prayer hall he had heard shouts of 'Hapuskan ISA' as he was walking down the staircase on the left side of the building towards his motorcycle;

(j) he, however, agreed with the suggestion of the learned DPP that he saw a row of people who were standing at the top and they were looking down at the group of persons who were assembled in the empty space within the compound of the building;

(k) he also saw many females in the group of persons;

(l) he did not see that some of them wore masks to hide their faces;

(m) he saw that they were carrying banners but he did not see what was written on the banners;

(n) he found himself trapped within the crowd when he reached the bottom of the staircase and he could not reach the place where his motorcycle was parked in order to leave the compound of the building;

(o) he disagreed with the suggestion of the learned DPP that he had intended to join and did in fact join the group of persons;

(p) he disagreed with the suggestion of the learned DPP that if it was true that he had not intended to join the group of persons he would have retreated back to the prayer hall upon seeing the crowd which had blocked his path to the place where his motorcycle was parked;

(q) he disagreed with the suggestion of the learned DPP that after he had joined the group of persons he had formed a human chain with some of the others in the group of persons; and

(r) he also disagreed with the suggestion of the learned DPP that he had also shouted 'Hapuskan ISA' and that he had expressed his anger at the Internal Security Act ('ISA') together with the others in the group of persons.

[99] When he was re-examined by the learned defence counsel, he said as follows:

(a) on the day in question he had gone to the National Mosque in order to perform his Friday prayers;

(b) he could not see his face or any part of himself in any of the photographs which were shown to him by the learned DPP;

(c) he did not know what was the purpose of the people who were standing in a row at the top of the open space within the compound of the building;

(d) he could only assume that they were merely observing the goings on of the group of persons down below;

(e) he did not see the writings on the banners;

(f) he did not know why there were banners in the photographs;

(g) after performing his prayers and while he was walking down the staircase he did not hear any orders to the public to disperse;

(h) he also did not see any police officer giving any orders to the public to disperse;

(i) he did not retreat into the building but merely remained near his motorcycle as he felt that by doing that he could leave the compound of the bulding faster; and

(j) he had spoken the truth and he did not concoct or frabricate his defence.

The second appellant's defence

[100] When he was examined-in-chief by his counsel, he said as follows:

(a) he was a student at the Universiti Teknologi Malaysia Kuala Lumpur ('UTMKL') at the material time;

(b) he was pursuing a diploma course in Computer Science;

(c) he was undergoing industrial induction training at a private computer company at Phileo Ampang Park;

(d) prior to that he had lived in a residential college at the campus, ie the First Residential College at his university, and he was active in the committee of the college and in taking care of the welfare of the collegians;

(e) on the day in question, he went into the office as usual at 9am for his daily industrial induction training;

(f) at 12.00 noon he took the Putra LRT to the Kuala Lumpur Art Market;

(g) he had planned to get down from the LRT station at the Kuala Lumpur Art Market and then take a bus to Shah Alam from the Klang Bus Station in order to meet up with his sister, Junainah bt Idris ('DW8') who was working at the PKNS Complex in Shah Alam;

(h) however, upon reaching the Kuala Lumpur Art Market, he realised that it was time for him to perform his Friday prayers;

(i) so he decided to perform his Friday prayers first before meeting up with his sister in Shah Alam;

(j) he then walked all alone by himself from the Kuala Lumpur Art Market through the Dayabumi building to the National Mosque as it was the nearest mosque;

(k) after he had performed his prayers at the National Mosque he walked to the back of the building in order to take a rest;

(l) he found other people who were also resting at the back of the building;

(m) suddenly he heard a commotion outside the building but within the compound of the building;

(n) he was curious to know what had caused the commotion;

(o) so he went to the front of the building;

(p) he walked down the main staircase in front of the building;

(q) he saw many people gathered within the compound of the building;

(r) he saw some of them carrying banners;

(s) he could not see what was written on the banners;

(t) he went nearer in order to get a better view of the words on the banners;

(u) he heard people shouting and calling out something but he could not hear clearly what it was;

(v) it was very noisy;

(w) he did not hear any warning which was given by way of loud hailers;

(x) suddenly, he saw a number of big-sized men in vivillian clothes, about 10 in number, who advanced into the crowd and the situation became chaotic;

(y) people ran in all directions and he panicked;

(z) suddenly, his hand was grabbed by one of the big-sized men and he was taken into a police van which was parked by the side of the compound of the National Mosque;

(aa) only then did he realise that the big-sized men in civilian clothes were police personnel;

(ab) he saw two other men who were similarly detained inside the van;

(ac) he was asked to produce his identity card;

(ad) subsequently, he saw other men being brought into the van;

(ae) he identified them as the other accused persons;

(af) all of them were then taken to the Dang Wangi Police Station; and

(ag) he did not take any part in the assembly of persons within the compound of the mosque.

[101] When he was cross-examined by the learned DPP, he said as follows:

(a) he agreed with the suggestion of the learned DPP that he was an active student in his university;

(b) he gave the name of his sister as Junainah bt Idris;

(c) he disagreed with the suggestion of the learned DPP that he had intended to participate in the assembly within the compound of the National

Mosque because he had gone there that afternoon instead of to another mosque, namely, Masjid Jamek, which was nearer to the LRT Station than the National Mosque;

(d) he also disagreed with the learned DPP that he did not go to the computer company for the industrial induction training as he was not suitably attired that day as he was wearing a light yellow coloured *songkok* but he agreed with the suggestion of the learned DPP that his face could be seen in the photograph P3 (34);

(e) nevertheless, he disagreed that he had participated in the assembly and had shouted 'Hapuskan ISA' together with the other participants of the assembly;

(f) he agreed with the suggestion of the learned DPP that there was a possibility that because the people in the assembly were shouting they could not hear the order of the police officer who had ordered the assembly to disperse;

(g) he disagreed with the suggestion of the learned DPP that he could be seen in the same photograph being part of the human chain and that after the police had announced the order to disperse he had reacted aggressively when the police arrested him;

(h) nevertheless, he agreed with the suggestion of the learned DPP that he had put up a struggle and also attempted to run away when a male police personnel in plain clothes had arrested him; and

(i) he disagreed with the suggestion of the learned DPP that he had concocted his defence that he did not intend to participate in the assembly on the day in question.

[102] When he was re-examined by his counsel, he said as follows:

(a) he reiterated what he had said in his examination-in-chief, that he had been active when he was in the Committee of the First Residential College prior to the day in question;

(b) however, after he had moved out of the residential college and he had started his induction training at the computer company he had stopped taking part in the Committee of the First Residential College;

(c) he reiterated what he had said in his examination-in-chief that it was his curiosity which had caused him to go near the assembly and that explained why his face could be seen in the photograph, P3 (34) and there is a police officer pointing his finger towards the assembly;

(d) he also admitted that in photograph P3 (36) he is seen being held by a police officer who had pulled him out from the assembly;

(e) after he was pulled out of the assembly the same police officer had asked him to produce his identity card;

(f) after he had produced his identity card he was taken to the van; and

(g) after that he did not attempt to escape from the van.

The third appellant's defence

[103] When he was examined-in-chief by his counsel, he said as follows:

(a) in the year 2001, he was a first year semester 2 undergraduate studying for a Bachelor of Information Technology in UKM;

(b) on the day in question, as originally planned by him, after his last lecture at 12.00 noon, he took a bus to the commuter train station;

(c) he then boarded the commuter train to Kuala Lumpur in order to purchase some items for his personal computer from a shop in Plaza Imbi in the Bukit Bintang area which he used to frequent;

(d) upon reaching the commuter station in Kuala Lumpur, he got down and proceeded to the National Mosque in order to perform his Friday prayers;

(e) he explained that he did not go to the UKM mosque because it was too early and it would entail him having to take a bus back to his residential college first before taking another bus to the UKM mosque;

(f) after that he would still need to take another bus to the commuter station in order to go to Kuala Lumpur to purchase some items for his computer;

(g) after he had performed his Friday prayers at the National Mosque he immediately left the prayer hall;

(h) he did not intend to participate in the assembly, he also did not participate in the assembly and he had intended to take a cab to the Art Market after performing his Friday prayers but he was unable to because there were too many people and traffic outside the National Mosque at that point in time;

(i) as he was walking out of the National Mosque, he also saw many people walking out of the National Mosque;

(j) it was very noisy as the people were conversing with each other and he also heard the sound of the busy traffic passing by outside the National Mosque;

(k) suddenly someone collided into him and his spectacles fell off from his face;

(l) he could not see clearly what was happening around him;

(m) everything was a blur to him;

(n) suddenly, he felt and saw a policeman arresting him;

(o) he knew that the person was a policeman because the person was wearing a police uniform;

(p) the policeman then dragged him to a van;

(q) inside the van the same policeman asked him to produce his identity card;

(r) he saw three or four other persons inside the van;

(s) he did not know them;

(t) he identified them as his co-accused in the dock;

(u) he was then taken to the police station where a policeman recorded his statement;

(v) he was then put inside a cell in the lock-up;

(w) while he was inside the lock-up, a big sized young man entered their cell in the lock-up;

(x) he introduced himself to the third appellant and the other co-accused persons as a police detainee;

(y) he then scolded and slapped the third appellant and the other co-accused persons for having taken part in the unlawful assembly;

(z) he also kicked the third appellant but not the other co-accused persons;

(aa) he then left their cell;

(ab) after him came another person who also entered their cell;

(ac) the person also introduced himself as a police detainee to the third appellant and the other co-accused persons;

(ad) the person then advised the third appellant and the other co-accused persons not to be involved in any organised assembly;

(ae) after he was released he went to the Hospital Kuala Lumpur for a medical examination but the doctor did not find any injuries on him showing that he had been slapped and kicked; and

(af) he did not know the first appellant at the material time although the first appellant was also a UKM student as both of them were studying in different campuses.

[104] When he was cross-examined by the learned counsel for the first and fourth appellants, he said as follows: A

(a) he reiterated that someone collided into him as he was walking out of the prayer hall of the National Mosque;

(b) he believed that the collision was accidental and it caused his spectacles to fall off his face but he himself did not fall down; B

(c) he explained that the collision occurred while he was still within the compound of the National Mosque;

(d) he saw that the assembly was a peaceful one as he saw the people in the assembly chit-chatting with each other; C

(e) when he was in the lock-up of the police station he had informed the big-sized young man who had assaulted him that he was not involved in the assembly and that he did not know anything about the assembly; and D

(f) after he was released by the police the next day he did not meet up with the first and second appellants and he did not know where they went.

[105] When he was cross-examined by the learned DPP, he said as follows: E

(a) he could not remember what was the lecture which he had attended on the day in question at his university before he went to Kuala Lumpur;

(b) he disagreed with the suggestions of the learned DPP that he knew about the assembly which was going to to be held within the compound of the National Mosque on the day in question as he had heard news of it circulating in his university, that he had also intended to participate in the assembly and that was the reason why he had made the effort and taken the trouble to go all the way to the National Mosque on the day in question to perform his Friday prayers; F G

(c) he also disagreed with the suggestion of the learned DPP that on the day in question he had participated in the assembly within the compound of the National Mosque by forming a human chain with the other participants in the assembly and shouting slogans, to wit, 'ISA zalim!' and 'Bebaskan tahanan ISA'; H

(d) he did not hear the police ordering the assembly to disperse;

(e) he also disagreed with the suggestion of the learned DPP that when the police moved into the assembly in order to arrest the participants he had attempted to run way but he was caught by PW4; and I

(f) he also disagreed with the suggestion of the learned DPP that what he had said in earlier in his examination-in-chief that he was assaulted by a big-sized young man while he was in the police lock-up was untrue;

[106] When he was re-examined by his learned counsel, he said as follows:

(a) he explained that he usually performed his Friday prayers within Bandar Baru Bangi and at the UKM mosque;

(b) on Fridays, he would usually return to his residential college after his lectures before going to the mosque to perform his Friday prayers;

(c) he did not own a motorcycle and he had never ridden a motorcycle to the National Mosque;

(d) on the day in question he had gone to the National Mosque to perform his Friday prayers because he had planned to go to the computer shop in the Imbi Plaza in Kuala Lumpur to purchase some items for his computer after he had performed his Friday prayers;

(e) when he went to the National Mosque he was unaware that an assembly was going to be held there; and

(f) he reiterated that he did not take part in the assembly at the National Mosque.

The fourth appellant's defence

[107] When he was examined-in-chief by his learned counsel, the fourth appellant said as follows:

(a) in the year 2001, he was a second year Bachelor of Science undergraduate in University of Malaya ('UM');

(b) he could not remember whether he had any lectures on the day in question;

(c) he had left UM at 10am that morning to go to the MARA building which was situated next to the Pertama Complex in Jalan Tuanku Abdul Rahman in order to collect his pocket money from his older sister who was working in that building;

(d) on his arrival at 10.30am he phoned his sister who informed him that she could not leave her office and that she could only leave her office at 12.30pm;

(e) so he met up with her between 12.00 and 12.35pm;

(f) after their meeting, they had lunch at the food court next to the Pertama Complex where his sister then gave to him his pocket money;

(g) he usually performs his Friday prayers at the Masjid Ar Rahman in UM but on the day in question since he was already late after meeting up with

his sister he had then proceeded to the National Mosque in order to perform his prayers as it was situated along his return journey to UM;

(h) upon arriving at the mosque, he parked his motorcycle at the roadside in front of the Pusat Islam;

(i) he then walked towards and entered the compound of the National Mosque;

(j) as he was walking he saw that many members of the public were also walking towards the National Mosque;

(k) it was very noisy as some of them were chit-chatting with each other;

(l) he also saw several police personnel in police uniform;

(m) it occurred to him that they must also be on their way to the National Mosque in orde to perform their Friday prayers;

(n) he then entered the prayer hall and perfomed his Friday prayers;

(o) while he was inside the prayer hall he did not hear the *Imam* making any announcement to the congregation;

(p) neither did he meet any of his co-accused inside the prayer hall;

(q) after the prayers he walked out of the prayer hall and down the staircase as shown in photograph P2 (no 35) into the compound of the building towards his motorcycle parked in front of Pusat Islam on the left in the direction of the road leading to the roundabout as could be seen in photograph P3 (no 35);

(r) he did not see anything unusual;

(s) he saw many members of the public in the compound of the building;

(t) he also saw some of the members of the public walking towards their respective vehicles;

(u) he also saw some of them still chit-chatting with each other inside the compound of the building;

(v) he saw that some of them were assembled together as can be seen in the photograph P2 (no 35) but he did not bother about them;

(w) he did notice some males (not females) in the assembly holding up what looked like cardboards to him but he did not notice any one in the assembly carrying any banner;

(x) suddenly the assembly dispersed with the members running in all directions;

(y) he explained that it was at this point in time that he felt someone colliding into him;

(z) this caused him to fall down and he could not get up because he was stepped upon by the others;

(aa) then someone grabbed his shirt-collar from behind and began pulling him;

(ab) as a result of that he felt faint and he lost consciousness momentarily;

(ac) he could not see the face of the person who had pulled him from behind;

(ad) he could see himself being held by a policeman as shown in the photograph P3 (no 36), but he was unsure whether the policeman was the same person who had grabbed him by the collar of his shirt from behind and dragged him into the van;

(ae) he only recovered consciousness when he was inside the van;

(af) he saw the other co-accused inside the van;

(ag) he asked the policeman inside the van why he was arrested but he was not told the reason;

(ah) he also told the policeman inside the van that he was not involved in the assembly but he was not released;

(ai) he was then taken to the Tun HS Lee Police Station where he was detained in the lock-up;

(aj) he was interrogated and released at 10am the following day after his statement D5, was recorded by the IO, Aziz;

(ak) his brother and sister, ie the sister who had given him his pocket money before he went to the National Mosque for his Friday prayers, met him at the police station after he was released;

(al) his brother then took him to the National Mosque where he retrieved his motorcycle which he had parked there the day before;and

(am) prior to the day in question, no-one had invited him to join the assembly within the compound of the National Mosque.

[108] When he was cross-examined by the learned DPP, the fourth appellant said as follows:

(a) his sister's name is Nor Asma bt Mohd;

(b) he would be calling her as his witness to support his defence;

(c) he disagreed with the suggestion of the learned DPP that his defence that he had gone to the MARA building to meet with and collect his pocket money from his sister was concocted by him because if it was true he would have phoned his sister first before he left UM;

(d) he explained that it was his usual practice to go to the MARA building first before phoning his sister;

(e) he agreed with the suggestion of the learned DPP that as he was walking towards the staircase to retrieve his motorcycle he could see what was happening along the pedestrian walk way and that there were many people in that area;

(f) however, he disagreed with the suggestion of the learned DPP that he could see that there were people who were demonstrating in that area and that he could also see that the police were controlling the situation;and

(g) he also disagreed with the suggestion of the learned DPP that if he had not intended to participate in the demonstration he would have waited until the people who were involved in the demonstration had dispersed before leaving the compound of the National Mosque.

[109] When he was re-examined by his learned counsel, the fourth appellant said as follows:

(a) he reiterated that he had gone to see his sister that day in order to collect his pocket money from his sister;

(b) he explained that he did not proceed to Masjid Jamek in order to perform his prayers because based on his personal experience that mosque was always packed on Fridays and as he was also running late on the day in question, he had chosen to go to the National Mosque in order to perform his prayers;

(c) he reiterated that he did not see people demonstrating in the compound of the National Mosque at the material time and that he also did not participate in the demonstration because he did not have any prior knowledge that there would be a demonstration there;

(d) he also explained that although he did see the police there he had assumed that their presence there was merely to control the many people who had gone to the National Mosque to perform their Friday prayers and not to control the demonstration; and

(e) he also reiterated that he did not agree with the suggestion of the learned DPP that he had the intention to participate in the demonstration on that afternoon although he was dressed in his Malay *baju* that day because it was his normal attire for Fridays while he was a student in UM even if he did not go to any mosque to perform his Friday prayers.

The fifth appellant's defence

[110] When he was examined-in-chief by his learned counsel the fifth appellant said as follows:

(a) in the year 2001 he was an electrical engineering undergraduate student of UITM in Shah Alam;

(b) on the day in question he attended lectures at about 10.00 in the morning;

(c) after his lectures had ended he chit-chatted with his friends;

(d) at about 12.00 noon he got onto his motorcycle and proceeded to his parents' house in Gombak;

(e) along the way he stopped at Tang Ling to have his lunch;

(f) after that he stopped at the National Mosque to perform his Friday prayers;

(g) it was 12.30pm when he arrived at the National Mosque;

(h) he parked his motorcycle and then he climbed the staircase to the prayer hall;

(i) after the conclusion of the Friday prayers, he walked down the main staircase towards the place where he had parked his motorcycle;

(j) as he was walking down he met a friend of his, namely, Amin Shah;

(k) he saw that Amin Shah was speaking to a policeman;

(l) he wanted to speak to Amin Shah;

(m) he walked towards Amin Shah;

(n) he called out to Amin Shah but the latter did not hear him;

(o) he saw Amin Shah speaking on his mobile phone so he spoke to the policeman;

(p) he asked the policeman what was happening but the latter did not respond to his query;

(q) the policeman then arrested him;

(r) he identified himself in the photograph, P3 (31);

(s) in that photogaph he could be seen hand cuffed but he could not be seen in the other photographs which show the partipants of the demonstration;

(t) he was not told the reason for his arrest until he was brought into a van which was parked about 30 metres from the place where he was arrested;

(u) he saw one other person inside the van but he did not know him;

(v) he was then taken hand cuffed to the THSL Police Station in the van together with six other persons in the van;

(w) at the police station he was interrogated and assaulted by the police and his photograph was taken;

(x) the policeman told him the demonstration was an unlawful assembly and he asked him who was the organiser but he replied that he did not know what had occurred at the compound of the National Mosque that day; and

(y) he was then kept in the lock-up for one night and released the next morning.

[111] When he was cross-examined by Encik Amer Hamzah, learned counsel for the first appellant, he said as follows:

(a) he did not carry any banner or any other item which was associated with the demonstration on that day;

(b) he could not see the faces of the first and fourth appellants in the photographs which were tendered by the prosecution;

(c) he did not see them carrying or holding up any banner concerning the ISA or 'reformasi' or participating in the demonstration;

(d) he had met them for the very first time in the van after he was arrested by the police and taken to the van;

(e) he did not know why they were in the van and he did not see any banner in the van;

(f) while he was at the compound of the National Mosque he did not hear the police issuing orders to the members of the public to disperse;

(g) he had not planned to meet up with Amin Shah at the compound of the National Mosque that afternoon after he had performed his Friday prayers;

(h) he had gone alone to the National Mosque on that day;

(i) he also explained that when he was arrested and brought into the van the one other person who was already there was the 6th accused but he did not know the 6th accused at that time;

(j) he agreed with the suggestion of learned counsel that when he was arrested the situation in the compound of the National Mosque suddenly

became chaotic as the members of the public were running in all directions in order to leave the compound of the National Mosque; and

(k) while he was in the lock-up he had spoken to all the other accused persons and all of them told him that they were not involved in the demonstration.

[112] When he was cross-examined by Encik Zulkifli, the fifth appellant said as follows:

(a) in photograph, P3 (25), he could see a policeman holding a loud hailer to his mouth as though the policeman was speaking into the loud hailer but on the day in question he did not see or hear any policeman using a loud hailer to speak to and direct or order the people in the compound of the National Mosque to disperse.

[113] When he was cross-examined by Cik Latifah Koya, the fifth appellant said as follows:

(a) when he was walking towards the place where his motorcycle was parked he was not obstructed by the police.

[114] When he was cross-examined by the learned DPP, the fifth appellant said as follows:

(a) in the year 2001 he was not involved in any students' association;

(b) it was his routine to go back to his parents' house on his motorcycle on Fridays because he had no classes on Saturdays and Sundays;

(c) he would use the Federal Highway and ride through UM before exiting in Bangsar towards the railway station;

(d) he agreed with the suggestion of the learned DPP that there were many mosques along the way to Gombak and that the Bukit Aman Mosque was even nearer than the National Mosque;

(e) he disagreed with the suggestion of the learned DPP that he had chosen to go to the National Mosque that day because he had the intention to participate in the unlawful assembly and because he had chosen that particular mosque and that he had also chosen not to use another entrance which was nearer than the entrance which he had used in order to enter the compound of the National Mosque;

(f) when shown the photograph, P2 (7), he agreed that when he was walking down the main staircase he saw many people and some of them were holding up banners but he did not hear anyone calling out or chanting slogans;

(g) he also agreed that it was very noisy because of the sounds of the vehicles from the traffic;

(h) he insisted that he was neither a member of the group of persons whom he had seen assembled there nor did he did carry any banner or chant any slogan and he had seen Amin Shah who also lived in Gombak there but Amin Shah was not a member of the assembly of persons;

(i) he disagreed that he and Amin Shah had headed the assembly of persons;

(j) he also disagreed that he had formed a human chain with others in the assembly and had chanted 'reformasi' and 'hapuskan ISA';

(k) when he was confronted with the photograph, P2 (26), he admitted that he was in the photograph but he disagreed that he had participated in the assembly of persons;

(l) he also disagreed that his testimony in his examination-in-chief was inconsistent with his testimony during his cross-examination by the learned DPP and that he had concocted his defence that he was not involved in the assembly of persons.

[115] When he was re-examined by his learned counsel, the fifth appellant said as follows:

(a) he explained that he had never gone to the Bukit Aman Mosque to perform his Friday prayers and he did not know whether it was in existence in the year 2001;

(b) he admitted that he saw writings on the banner but he was not paying attention to them;

(c) Amin Shah did not inform him of the assembly at the compound of the National Mosque;

(d) he identified himself in the photograph, P3 (30), as the person who wearing a checked shirt but he explained that the reason why he could be seen in the photograph, P3 (30), was because when he spoke to the policeman the latter was speaking to Amin Shah and did not pay him any attention so he decided to walk around the area and for 5–10 minutes he did that and he also walked in and out of the assembly of persons; and

(e) nevertheless, he insisted that he did not participate in the assembly.

Findings of this court

[116] It is clear from the oral testimonies of the five appellants as set out above that on the day in question they did not know each other and that they

had, separately, without prior planning and concert, converged at the National Mosque innocently and solely with the intention of performing their Friday prayers because it was the most convenient mosque to do so as they were travelling to different destinations for different purposes.

[117] It was very obvious that they tried very hard to distance themselves from the assembly of persons by insisting that they did not notice the participants holding banners or hear the participants of the assembly chanting and shouting 'Reformasi' and 'Hapuskan ISA' or the policeman giving orders to the members of the assembly to disperse. When cross-examined by the learned DPP who confronted them with the relevant photographs showing their presence near or in the assembly of persons who held banners with those words on them and the presence of policemen at the place where the assembly was held they were compelled to change their testimonies.

[118] One of the defence witnesses, to testify in support of the defences of the five appellants was Amin Shah (DW7). He was a third year Bachelor of Business Administration undergraduate student in Universiti Pertanian Malaysia (UPM) at the material time. He confirmed that there was an assembly of persons at the compound of the National Mosque at the material time.

[119] He saw many people in the assembly as he was walking down the staircase after having performed his Friday prayers. They were protesting against the ISA. Some of them held up banners and manila cardboards but he did not notice the writings on them. He did not notice who was leading the assembly. He did not participate in the assembly. When he saw the police moving into the assembly to arrest the participants he had asked a policeman why he had done that. The policeman did not entertain his query.

[120] He saw that there were chaos and panic among the participants of the assembly who were running in all directions to avoid being arrested.

[121] Initially he said that the police arrested the persons who were present in the assembly. He did not notice how many persons were arrested. He identified one of them as the fifth appellant whom he had known for about 5–6 years prior to the fifth appellant's arrest. Subsequently, DW7 changed his testimony and said that the fifth appellant was not a participant of the assembly and that he had known the fifth appellant ever since both of them were children.

[122] He confirmed that both of them were residing in Gombak. Subsequently, he changed his testimony and said that the fifth appellant did not participate in the assembly.

[123] He said that the fifth appellant had approached him to ask him about the assembly but he did not respond to the fifth appellant as he was in the midst of speaking to the policeman as shown in the photograph, P3 (26). He could not remember what was being said by a policeman using a loud hailer. He disagreed with the suggestion of the learned DPP that the policeman had ordered the participants to disperse but they refused and that was why the police moved in and arrested the participants of the assembly.

[124] DW7 also testified that he had received information that morning at the university campus which was spread by word of mouth by the students of UPM that they were going to assemble in the compound of the National Mosque that Friday after noon. He could not remember the identity of the person who had given him the information. So he went there to see what was happening. He assumed that the participants in the assembly were undergraduates of his university.

[125] He could not remember whether the policeman had threatened to arrest him as well. After the police had arrested the persons in the assembly he was afraid that the police would arrest him as well. So he left the compound of the National Mosque and went back home.

[126] Another defence witness, Junainah bt Idris (DW8), the sister of the second appellant testified in support of the second appellant. However her oral testimony contradicted that of the second appellant. She said that he had called her the day before to inform her that he was going to see her the next day as he had run out of pocket money. So she met up with him on the day in question and gave him some snacks.

[127] Another defence withess, Nor Asma bt Mohamad (DW9), the sister of the fourth appellant, testified that the day before the latter was arrested he had telephoned her for the very first time to ask her for money. He did not inform her that he was going to participate in the assembly. On the day in question she had met up with him as arranged the day before at the food court beside the KFC shop at the Pertama Complex. They had lunch and chit-chatted with each other.

[128] He then left her but he did not inform her that he was going to the National Mosque to perform his Friday prayers.That same evening she received a call from the police. The police informed her that the fourth appellant was arrested by the police. He was released the next day.

[129] Another witness, Mohd Ruzaidi bin Sadikin (DW10), testified in support of the first appellant. At the material time he was a second year undergraduate in UKM and he knew the first appellant. Like the first appellant

he was also involved in the PMUKM being the programme director for the Kem Jalinan Ukhwah-3 whilst the first appellant was the advisor of the programme.

[130] He said the first appellant had assisted him by buying the souvenir for the lecturer for the programme. The first appellant was also tasked with officially declaring open the programme on the day in question. However, due to the arrest of the first appellant by the police, the first appellant could not perform that task that day.

[131] DW10 could not produce the minutes of the meeting of PMUKM which would show that what he had said about the programme and the task of the first appellant were true as the minutes had been thrown away due to the long lapse of time between the meeting and the day he had testified before the third magistrate.

[132] When he was cross-examined by the learned DPP he conceded that it was not the duty of the first appellant as the advisor of the programme to purchase the souvenir for the lecturer of the programme.

[133] The final witness, Mohammad Suhaimi bin Abdul Aziz (DW11), gave evidence in support of the third accused. Like the third accused, he was also an undergraduate at the UITM, Shah Alam. He had dealings with the latter because he was the committee member of the Kelab Usahawan of which the latter was the president.

[134] He also testified that on the Thursday before the day in question he had met the third accused at the campus of UITM, Shah Alam. The latter told him of his intention to go to the bookshop in Jalan Pahang to purchase books for sake at the club the following day which was a Friday. He knew that it was the third accused's practice to go to the bookshop in Jalan Pahang to purchase books on certain Fridays and then to the National Mosque to perform his Friday prayers.

[135] This court was satisfied that the five appellants had failed in their defences to raise a reasonable doubt in the prosecution case that the assembly of persons was not an unlawful assembly in that it was not organised or convened without a police permit, and to show on the balance of probabilities that their presence in the unlawful assembly came about through innocent circumstance and that they had no intention to participate in or to be associated with the unlawful assembly.

[136] The arresting officer (PW3) had testified that he arrested the first appellant who was not wearing a mask and who was in the unlawful assembly

of persons. He identified the first appellant. The third magistrate found the evidence of the first appellant inconsistent and therefore she did not believe his defence. This court had no reason to differ with her findings.

[137] The second appellant was arrested by PW6, the arresting officer. PW6 testified that he saw the second appellant in the unlawful assembly and PW6 arrested him. His oral testimony is corroborated by the photograph P3 (34). The third magistrate was satisfied that he had participated in the unlawful assembly. She did not believe his defence that he had no intention of participating in the unlawful assembly. She was perfectly entitled to do that. She had seen and heard him giving evidence before her. She evaluated his evidence against the salient evidence of the prosecution.

[138] The third appellant was arrested by PW4, the arresting officer. PW4 testified that the third appellant who was not masked was in the unlawful assembly at the material time. The third magistrate did not believe him because of the vague manner in which he had answered questions posed to him. She was of the view that the third appellant could not have missed seeing and hearing the assembly of persons holding and waving placards and banners and shouting and chanting slogans as it was so obvious to anyone passing by the place based on the evidence adduced by the prosecution and the testimonies of the other defence witnesses.

[139] The fourth appellant was arrested by PW11. PW11 testified that the fourth appellant was a participant of the assembly and that he had fallen while he was still in the assembly and he had arrested the fourth appellant. The third magistrate rejected his defence that he was arrested while he was walking down the staircase. She made a proper evaluation of his evidence and the evidence of the prosecution before she ruled in that manner. Her ruling could not be faulted by this court.

[140] The fifth appellant was arrested by PW5. PW5 saw the fifth appellant giving instructions to the participants of the assembly. He testified that the fifth appellant appeared to be the leader of the assembly. He saw and heard the fifth appellant shouting and chanting the words 'Reformasi' and 'Hapuskan ISA'. He could identify the fifth appellant in the photographs, P2 (24) and (33), and P3 (26), (27), (30) and (31). The third magistrate noted that his testimony was corroborated by that of PW1, another prosecution witness. The third magistrate was of the view that the defence of the fifth appellant was an afterthought and was concocted to rebut the prosecution case and to cast a doubt in the prosecution case. She was satisfied that he had participated in the assembly.

[141] Therefore, based on a perusal of the appeal record this court was

satisfied that the third magistrate did not err when she ruled that the prosecution had proved the charge against all the five appellants beyond reasonable doubt and when she, accordingly, convicted them of the offence as charged.

[142] This court was of the view that the explanations of the five appellants were not plausible and might not reasonably be true when tested against the backdrop of the prosecution case. This court was of the view that the convictions of all the five appellants were safe after considering the totality of the evidence adduced by all the parties.

Whether the said sentences were manifestly excessive?

[143] The court was of the view that the fifth issue also had no merit.

[144] The learned counsels for the appellants have not submitted on the appellants' appeal against their sentences in their written submissions although ample time and opportunity were given to them to do so. The court was of the view that the appellants had abandoned their appeal against the said sentences.

[145] The punishment for the offence under s 27(5) of the Act is set out in s 27(8) of the Act. It is a fine of not less than RM2,000 and not more than RM10,000 and imprisonment for a term not exceeding one year.

[146] By virtue of sub-s (8A) of the Act, upon the conviction of an offender the court no longer has the power under ss 173A and 294 of the Criminal Procedure Code (the 'CPC') to order good behaviour bonds for offenders in lieu of a fine or an imprisonment term.

[147] This court was of the view that the said sentences were not manifestly excessive and that the learned magistrate had applied the correct sentencing principles in arriving at the said sentences.

[148] The learned magistrate had duly considered the undisputed fact that all the five appellants were students when they committed the offence. She had, however, felt that they ought to be held responsible for their acts and she had imposed upon them a fine since she did not have the jurisdiction to release them on good behaviour bonds.

CONCLUSION

[149] In view of the matters as set out above this court was satisfied that the

third magistrate was correct in holding that the prosecution had succeeded in proving the charge against the five appellants beyond reasonable doubt.

[150] This court, accordingly, dismissed the appeals of the five appellants and confirmed their convictions and sentences of RM3,900 in default three months imprisonment each.

Appeals dismissed and convictions and sentences affirmed.

Reported by Ashok Kumar